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In The

Supreme Court of the United States

October Term, 1998

JAMES A. McNAMARA, JOHN J. SULLIVAN, THOMAS R. MILLER, CHARLES W. LUX, WILLIAM T. KING, CHARLES E. DINEEN, RICHARD A. GRAF, HENRY T. SCAVONE AND PAUL B. SOBCZAK,

Petitioners,

v.

CITY OF CHICAGO, A MUNICIPAL CORPORATION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF

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ARGUMENT

I.

The City has failed to identify any practice that intentionally excluded blacks or Hispanics from the opportunity for hire or promotion because of their race or ethnicity.

Introduction

The City of Chicago ("the City") acknowledges that it needed to present a strong basis in evidence that quota promotions to captain, in 1991-92, were a narrowly tailored remedy for lingering effects of specifically identified practices designed to intentionally exclude blacks and Hispanics from promotion based upon their race or ethnicity. (City's brief, p.16)

The City does not dispute that the issue of whether it presented a strong basis in evidence was an issue of law, and should have been examined by the Court of Appeals under plenary review, rather than giving deference to the district court's conclusions. (City's brief, p.28)

In its brief in opposition, the City has failed to point to evidence to support the Court of Appeal's finding that fire department officials carried out racial policies and demonstrated uncongeniality into the 1980s. (Pet. App. 9-10) Further, the City has failed to identify any practice that intentionally excluded blacks or Hispanics from the opportunity for hire or promotion because of their race or ethnicity. To the contrary, the undisputed evidence was that the City targeted recruiting at blacks and Hispanics since the 1960's, and imposed hiring and promotion quotas since the 1970's. (Pet. for Cert., pp.4-7)

The City does not dispute that two judges found that it did *not* intentionally discriminate in either hiring or promotion, after legal challenges to its hiring and promotion practices by the United States. (Pet. for Cert., pp.2-3)

Despite its court victories, the City agreed to hiring and promotion quotas. In both the 1974 consent decree for hiring quotas, and the 1980 settlement order for promotion quotas, the express purpose was to create racial balance between every rank of the CFD with the general population. The city defendants expressly pointed out: "nor is there to be any implication of an admission,

that they or any of them have violated any provisions of Title VII . . . " (R.91, tab E, pp.2-3, tab Q, p.2)

Medical disqualifiers for entrance

In an attempt to show a past discriminatory practice, the City states: "witnesses testified to perceived pretextual disqualification of African Americans for reasons such as flat feet". (City's brief, p.8)

Actually, the City put on *only two* witnesses who saw blacks disqualified for physical/medical reasons, one *in 1948* and the one *in 1959*. Nevertheless, whites as well as blacks have been disqualified for flat feet, and other medical reasons. (R. 149, T. 240-242) (T. 939-40, 1044-45, 1048, 1054)

The City produced no evidence that physical/medical hiring requirements were pretextual, nor that they applied only to blacks.

Failure to hire anyone between 1974-77

The City makes a totally unsupported representation, that "rather than hire minorities under the consent decree, the City between 1974-77 hired no firefighters and made no promotions". (City's brief, p.13)

The City produced no evidence that the lack of hiring between 1974-77 was racially motivated. The hiring was done according to budget, and the City's own witness, retired black battalion chief Oswald Lewis, testified that, during that time period, the CFD was experimenting with smaller regular companies, supplemented by seven back-up squads. Further, the manpower reduction had begun in 1969, five years before the hiring consent decree. Lewis was captain of one of the back-up squads, from 1969 to 1974. This structuring of the CFD, with smaller companies with back-up squads, was initiated upon a consultant's advice, who had made a survey of the City. (T. 443, 473-75, 484).

Also, in 1976 and 1976, the City hired approximately 200 employees for the CFD into the newly created job category of paramedic, which lessened the need to hire firefighters since, previous to that time, firefighters had manned ambulances. (R. 136-2, Pl.Exs.9, pp.58-63 & 9a) (T. 866-868).

In 1976, the City budgeted 300 vacancies for entry-level firefighters. (R. 136-2, Pl.Ex.34). In 1977, the City certified 253 firefighters for a February and April class, of which 197 were blacks and Hispanics. (Pet. for Cert., pp.4-5).

Comments Overheard By Crane

The City points to comments overheard by retired black district chief, Bennie Crane, who is black, which the City has altered by adding the work "minorities" in brackets to make the comment sound racial. Crane stated he heard one chief state: " 'they can make us hire them but they can't make us keep them" ' (T. 576), and heard another chief state " 'We're not going to allow them to take over this Department' " (T. 579), with no reference in either statement to minorities. In its brief, the City changes the work "them" in Crane's statements, to the word "minorities". There is nothing to show that the speakers were referring to minorities, and they may have been referring to the entire class of 1977 which had been hired under reduced standards.

There is no claim that any black or Hispanic members of the class of 1977 were terminated, and they had the benefit of the following 20 years of promotion quotas.

So far from discouraging the minorities in the 1977 class, the City actually made Crane as an instructor, where he was "assigned the responsibility to act as a consultant to ease the assimilation of the large number of minorities into the Fire Department and to consult with the instructors." (T. 576).

Crane rose to the rank of battalion chief and was appointed too exempt positions, retiring as a district chief. (T. 587-588).

Black Officers in the 50's and 60's

The City claims "thorughout the 50's and 60's the officers at the all black companies were nearly always white." (City's brief, p.9). Nevertheless, that claim is defeated by the City's own witnesses and photographs, which showed black officers were in black houses and in integrated houses, and even black officers were in white houses. (Def.Ex.99a-h, R.162-6), (T. 337-38, 348, 451-53, 457, 460-61, 465, 469-72, 473, 474, 525, 527, 533, 851, 922-923, 941, 967-69).

Efficiency Ratings For Promotions

The City claims that for the 1978 lieutenants' and captains' tests, the blacks efficiency ratings were far below whites. (City's brief, p.15). In actuality, for the 1978 promotion tests, minorities received quota promotions, so low efficiencies did not affect their advancement, and there was no adverse impact in selection rates. Even before the imposition of quotas, there was no adverse impact on the 1978 captains' test. (R. 162-2, Def.Ex.47), (R. 136-2.Pl.Ex.21-23, pp.3-4), (T. 141-154, 156-161).

Blacks did well on efficiencies before the quotas began. For the 17 promotional tests given between 1960-1973, on 12 of the tests the average efficiency rating of the black candidates were higher than the average efficiency ratings of white candidates. On the remaining 5 tests, the efficiency ratings did not have a statistically significant impact on blacks in the results of any test. (R.136-1, Pl.Ex.11.p.5; Pl.Ex.11a,p.6, excluded from evidence[1])

Prior Segregation of Fire Houses

The City points to its long ago practice of segregating firehouses as white and black houses, which was unrelated to hiring and promotions. Further, the Court of Appeals found that the practice ended in 1965, 26 years before the promotions at issue, *United States v. City of Chicago*, 573 F.2d 416, 428 (7th Cir. 1978).

The Court of Appeals found that the CFD's assignment and transfer policies did not violate Title VII. The Court sustained the district court's findings that since 1966, assignments and transfers have been based primarily on seniority, and the fact that predominantly black houses were located in predominantly black areas resulted partly from personal preferences of blacks, *Id.*, 573 F.2d at 428.

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[1] The improper exclusion from evidence of the City's documents, and particularly its "Arimond letter", was raised in petitioners' brief in the court of appeals (points IV & XI, pp.24, 62), contrary to the City's misstatement in its present brief, (City's brief, p.2, n.1).

The City's own black witness, De la Cerna, testified he liked being assigned to a black house in 1955, and he did not seek a transfer, since it was near his home. (T. 507-08).

Individual Job Complaints of Black Witnesses

The City points to isolated, miscellaneous job complaints made by some of its black witnesses, from the 1950's and 1960's, about such things as a vandalized locker and a furlough change, unrelated to the hiring and promotion process.

The City fails to even suggest how passing over plaintiffs for promotion to captain in 1991-92, because they are white, could be considered a remedy for those job complaints.

The fact that there were so few incidents, so long ago, actually shows a lack of race problems in the CFD.

The City's witnesses themselves did not claim any past incidences affected their promotions. Most of the city's black and hispanic witnesses had stellar careers, most rose through the ranks to lieutenant, captain or battalion chief, and some were appointed to exempt (top command) positions, such as Commissioner, Deputy Commissioner, etc. (R.136-2, Pl.Ex.37, p.20-39).

The Hispanic witnesses had no complaints. A small number of the black witnesses had complaints as follows:

James Winbush is now a captain (R.149, T. 330), and did not claim the following instance negatively affected his promotions.

In 1969, unknown persons wrote "nigger" on Winbush's locker, and vandalized it. This was the only incident that was clearly race-related. The City appropriately remedied the incident, by sending a black police officer, a black police lieutenant, and an evidence technician to investigate. They determined that the wrongdoers may have been neighbors. (T. 344-346). There is no suggestion that this incident was caused or tolerated by anyone running the fire department. Further, the City transferred Winbush to Truck 42, where his father's friend, who was black, was the captain. (T. 348).

Francisco De la Cerna was promoted every time he took a promotion test to the highest rank of battalion chief, and became a Deputy Fire Commissioner. (Pl.trial Ex.37, pp.20-21). He did not claim the following instances negatively affected his promotions.

Sometime between 1963-67, De la Cerna's furlough was changed for unknown reasons, not given up as the City misstates. (City's brief, p.11). There is no indication that this furlough change was race-related. At the time, furlough were scheduled arbitrarily, not by seniority as the City misstates. (T. 511, 515, 516, 935, 936).

De la Cerna never claimed he was subject to acts of retaliation when he made a complaint about the furlough change, contrary to the City's claim. (City's brief, p.12).

The City omitted that De la Cerna testified that his complaint was remedied to his satisfaction, when he accepted, in settlement, an apology from the captain, in front of the "troops" on all 3 shifts at roll call. (T. 519, 529-532).

In 1967-68, after a transfer, De la Cerna's new captain said he would never get a company as long as he was in the second division. (City's brief, p.12). The City omits the context, namely that De la Cerna had been transferred after he had kicked garbage down the stairs in front of his former captain. He received no punishment. (T. 522-23, 525-26). The City omits that De la Cerna nevertheless did receive a permanent assignment in the second division, as an engineer, and that he stayed there, at his request, even after he was promoted to lieutenant. (T. 528-529).

Around 1962, in one incident, which the City embellishes with the use of the plural, a black fireman ate in a restaurant rather than in a house which was not his regular assignment. (T. 605,608,615). In another incident in 1965, a black fireman, who was newly assigned to a firehouse, did not get help with the dishes until after two to three months. (T. 881,885,894) (City's brief, p.12)

The City states that blacks were assigned to beds. (City's brief, p.12) Actually, beds were not assigned. A new transferee into a house took whatever bed was open, and that was his bed from then on. (T. 1045-46)

The City claims that some minorities were not given the opportunity to "act up". (City's brief, p.12) Contrary to the City's implication, there was no defined criteria, including seniority, for assigning actors. (T. 214-15, 238-39) In actuality, most of the white plaintiffs, as well as other whites, were never given the opportunity to act up, and sometimes blacks did act up. (T. 605,607,609,935,1045,1049,1055-57,1064)

"Acting up" experience has never been a component in a promotion score.

The random inclusion of Hispanics in the quotas

To defend the inclusion of Hispanics in its quotas, the City falsely argues there was evidence of hostility and animosity toward Hispanics. (City's brief, p.22) There was no such evidence, and the City fails to state what that evidence was, or to give any citation to record.

The Court of Appeals found that the City's "statistician's evidence does not suggest discrimination in the hiring of Hispanics, who until the 1980's applied for firefighters jobs at a substantially lower rate than their percentage of the relevant age group". (Pet.App. 8)

The City points to the former height requirement, which was race-neutral, and would apply to Asians, Greeks, Polish, and other ethnic groups with short males. (City's brief, p.22)

The City claims, without support from the record, that former Fire Commissioner Quinn, "let it be known that they (Hispanics) were officially unwelcome". The City points only to the testimony of James Winbush, who is black, that Quinn told Winbush, privately, that Mexicans were not tall enough to fight fires. (City's brief, p.8) Winbush never testified that any Hispanics heard this.

Furthermore, Quinn's actions brought more Hispanics into the department. The height requirement was lowered and the citizenship requirement dropped. (R.136-3, Soto dep.91) (R. 162-1, Def.Ex.12) In 1977 Quinn hired both blacks and Hispanics under 50% hiring quotas. (Pet for cert, pp. 4-5)

The City, parenthetically refers to: "(the testimony of Francisco de la Cerna regarding exclusion of Hispanics)" (City's brief, p.9) There was no such testimony. The district court made a clearly erroneous finding that "de la Cerna was told by a fire department officer that the department did not hire Mexicans and Puerto Ricans when he applied in the 1950's." (Pet.App. 26) In actuality, De la Cerna never said that a "fire department officer" made the above statement; it was a man who did not identify himself as employee of the City. This

statement was made in the *1950's*, 40 years ago. (T. 494-496, 547-548)

Hispanics were hired by the CFD. Former Commissioner Raymond Orozoco, who is Hispanic, was hired in 1959. (T. 204) (R. 136-3, Soto dep. 5, 79)

Statistical evidence

As stated above, the Court of Appeals found no statistical disparities regarding Hispanics. (Pet.App. 8)

Contrary to the City's misstatement in its brief (City's brief, p.20), its statistician, Dr. Gerry Suchanek testified that statistical disparities in regard to blacks are *not* proof of prior discrimination:

> "I have avoided saying that it's discrimination or that there is proof of discrimination. . . . " (T. 773)

Suchanek testified he had no evidence of any hiring or promotion practice that discriminated on the basis of race. (T. 796)

For hiring, the City acknowledges that it lacked the data Suchanek needed to do an analysis for the time period before applicant rates were skewed by targeted recruiting of blacks and Hispanics in the late 1960's and before hiring quotas began after 1974. The City acknowledges that prior to 1974, the City lacked applicant data. (City's brief, p. 5)

The city acknowledges that Suchanek did not tailor the general population to the qualified, interested applicant pool for hire. Suchanek used census data, which is too broad, since it includes non-citizens, illiterates, convicted felons, drug users, and persons not interested in the job. Before 1978, the CFD had a citizenship requirement. (R. 136-3, Soto Dep. 91). The CFD's entrance test required a minimal reading level. (T. 791) In and before the 1970's, the CFD disqualified applicants with certain felony convictions, including murder, rape, arson, and narcotics offenses. (T. 136-3, Soto Dep. 92-94) (T. 1057, 1045, 1048-49, 1055) (R. 136-1, Pl.Ex.3)

For promotions, the City acknowledges that it lacked racial identities of firefighters who had left the job before 1983. (City's brief, p.5, and p.5, n. 3) (T. 780-782, 788) (T.

771-72) Suchanek failed to tailor the eligible pool for promotion to the qualified applicant pool. Suchanek testified that the city failed to provide him with the reading levels of the promotion tests, to contrast with the low reading level required for entry. (T. 791-92)

In *Cox v. City of Chicago*, 868 F.2d 217, 222 (7th Cir. 1989), the city successfully argued that racial underrepresentation in upper ranks of the CFD was caused by affirmative action in the lower ranks.

For the period before 1983, the period for which Suchanek lacked accurate data, the City's own "Arimond letter", shows that from 1950 to 1987 blacks spent less time in rank before promotion than whites. For the time period that he had accurate data, namely 1983 forward, Suchanek showed that whites, not blacks, were held back in promotions. He showed that the length of time it has taken for whites to be promoted from firefighter to lieutenant and from lieutenant to captain has been longer than that for blacks. (Pet for Cert., p. 5)

II.

The City failed to explore race-neutral alternatives.

The City does not dispute that it failed to explore the race-neutral alternatives to increase the number of blacks and Hispanics in the upper ranks, such as giving promotion tests more frequently, or offer an early retirement program. The City's personnel commissioner simply concluded there was nothing he could do. (City's brief, pp. 24-26)

III.

The quotas unduly trammeled on white males.

The City misrepresents that its "goals were temporary" (City's brief, p.4)

In actuality, the City imposed both lieutenant and captain quotas since 1978, and continued race based quotas for the captains' list following the 1986 list that is at issue here. (R. 11, pars. 10 & 12), Supp. R. filed 4/23/97 for 93 C 3028 (Pet. for cert. pp.6-7)

Twenty years of quotas is not temporary, it is undue trammeling, destroying the careers of white males, particularly considering the long time between promotion tests.

The city urges that pursuant to a "wrap around agreement" with the United States, it promoted the white males passed over by quotas, and yet contradicts itself by admitting that 6 of the 9 plaintiffs were not promoted. (City's brief 3, 4, 27) There is no "wrap around agreement" in the record. The document cited by the City is its own letter, where it misrepresented to the United States that it would promote whites passed over by quota promotions. (R. 162-1, Def. Exs. 8 & 9)

IV.

The standing of 6 of the 9 plaintiffs is ripe for review.

The Court of Appeals apparently affirmed the district court's finding that 6 of the 9 plaintiffs had no standing to claim promotions, so that issue is ripe for further review, contrary to the City's position. (Pet. App. 3) (City's brief, p.29)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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